Department of Labor and Industry
Board of Personnel Appeals
PO Box 6518
Helena, MT 59604-6518
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 12-2007

PHILLIP J. LAUMAN Complainant, -vs- AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 256, AFL-CIO, and TIMM TWARDOSKI, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL #9, AFL-CIO Defendant.	INVESTIGATIVE REPORT AND NOTICE OF INTENT TO DISMISS

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I. Introduction

On December 4, 2006, Phillip Lauman, an employee at the City of Kalispell Waste Water Treatment Plant, hereafter WWTP, filed an unfair labor practice charge with the Board of Personnel Appeals alleging that the defendant violated 39-31-402 (1) and (2) MCA by "restraining employees and refusing to bargain in good faith on behalf of employees". The American Federation of State, County and Municipal Employees, hereafter AFSCME, denies any violation of Montana law.

John Andrew was assigned by the Board to investigate the charge.

II. Discussion

The Board of Personnel Appeals has jurisdiction over this matter. The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using Federal Court and National Labor Relations Board (NLRB) precedent as guidelines in interpreting the Montana Collective Bargaining for Public Employees Act, State ex rel. Board of Personnel Appeals vs. District Court, 183 Montana 223 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No. 45 vs. State ex rel. Board of Personnel Appeals, 185 Montana 272, 635 P.2d 185, 119 LRRM 2682; and AFSCME Local No. 2390 vs. City of Billings, Montana 555 P.2d 507, 93 LRRM 2753. To the extent cited in this decision,

and where state precedent is lacking, federal precedent is considered applicable.

The statutes that Mr. Lauman allege were violated provide:

39-31-402. Unfair labor practices of labor organization. It is an unfair labor practice for a labor organization or its agents to:

(1) restrain or coerce employees in the exercise of the right guaranteed in 39-31-201 or a public employer in the selection of his representative for the purpose of collective bargaining or the adjustment of grievances;

(2) refuse to bargain collectively in good faith with a public employer if it has been designated as the exclusive representative of employees;

(3) use agency shop fees for contributions to political candidates or parties at state or local levels.

39-31-201. Public employees protected in right of self-organization. Public employees shall have and shall be protected in the exercise of the right of self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint, or coercion.

Mr. Lauman makes five allegations as to why he believes that the union breached its obligation to fairly represent him, and seemingly other employees working at the WWTP. The allegations are:

1) No job postings at the treatment plant for any open city positions
2) No union meeting notices of any kind
3) No information on current negotiations
4) No communications with union officials, and
5) The proposals to the city by the union have ignored recent wage adjustments and incentives.

In his cover letter attached to the complaint Mr. Lauman represents that, “Ever since the operators of the Kalispell waste water treatment plant tried unsuccessfully to de-certify the union we have been met with a ‘stone wall’ attitude from the rest of the membership. Due to the lack of representation and other activities, therefore, I am filing an unfair labor practices”. As a remedy to his charge Mr. Lauman requests that the Board of Personnel Appeals, should it find merit to the complaint, remove the classification of Waste Water Treatment Plant Operator from the union. Before addressing the merits of the complaint it is first important to address the requested remedy.

Bargaining unit composition is addressed at the time a bargaining unit is recognized by the employer or certified by the Board of Personnel Appeals. Beyond that inclusions and exclusions from the bargaining unit can be addressed either through appropriate Board procedures, brought at the appropriate time, or at the table as a permissive subject of bargaining. The Board has consistently ruled that requests for partial decertification, separating one part of a bargaining unit from an overall unit, are inappropriate because of the extreme fragmentation that can occur as well as the instability that could destroy the very fabric of a stable labor relations process. See, for

instance, UD 19-75 (Helena Vo_Tech); DC 2-75 (Department of Highways, Big Timber unit); DC 5-75 (Department of H ighways, Havre Division); and DC 4-78 (Lewis and Clark County Sheriff's Department). The remedy requested by Mr. Lauman is not appropriate in the context of an unfair labor practice charge.

Turning to the complaint, a union violates its duty of fair representation to the employees it represents only if its actions are "arbitrary, discriminatory or in bad faith . . ." Vaca v. Sipes, 386 U.S. 171,190 [64 LRRM 2369] (1967). To determine if the duty to fairly represent has been breached each element in the three part standard must be examined, Airline Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 77 [136 LRRM 2721] (1991).

Applying the arbitrary prong to the five allegations made by Mr. Lauman there really is nothing arbitrary in what the union did or did not do. Concerning allegation #1, job posting at the treatment plant is not even something that appears to be the responsibility of the union. It is a management function. The other allegations, with the exception of #5 are disputed by the union, and at best, and if true, they can be deemed lack of communication and at the worst, poor communication. Other than the fact there was a decertification there is no substantial evidence to establish a link between the allegations and anything done, or not done, by the union or any of its representatives. Looking to allegation #5, this issue is understandably of great significance to all employees in the bargaining unit, including the WWTP employees. If overlooked it could be an element in a fair representation case. However, it has not been overlooked by the union. In fact, the union has filed an unfair labor practice charge alleging that the wage increase at the WWTP was a unilateral change in a mandatory subject of bargaining. The WWTP employees, including Mr. Lauman, may well disagree with the position taken by the union since they have benefited by a wage increase that has occurred during negotiations. However, as the court pointed out in Ooley v. Schweitzer Div. Household Mfg., Inc., 961 F2d 1293 [140 LRRM 2138[(7th Cir.1992) the "arbitrary" prong of the fair representation test is very deferential toward the union and it is not the role of the court to second-guess tactical decisions made by the employees' duly appointed bargaining representative. And, quoting O'Neill, 499 U.S. at 78, inquiries into such decisions and whether they are arbitrary or not are not made unless they "are so far outside a wide range of reasonableness, that the actions rise to the level of irrational and arbitrary conduct". In the light of the arbitrary prong of the test, and as further discussed in light of the discrimination prong of the test, AFSCME did not act in an arbitrary manner taking the position it has on the implemented wage increase to a portion of the bargaining unit.

The second prong of the test for fair representation is discrimination. Here Mr. Lauman contends that the conduct of the union – the five allegations – came about as a result of a decertification effort in which WWTP employees were engaged. To be sure WWTP employees were not the only ones involved in the decertification, but WWTP employees were the only employees to see the wage increase that occurred during negotiations. Here, communication may or may not be problematic, but that in and of itself does not demonstrate discrimination. In fact, as found in Griffin v. Air Line Pilots, 32 F.3d 1079, 146 LRRM 3092 (7th Cir. 1994) simply because a union acts to favor a majority over a

minority does not constitute a breach of duty. As with any organization that must decide matters of controversy many actions of a union satisfy the majority to the chagrin of a few. Here, beyond the communication issue, the union in its not unreasonable view, was attempting to protect the integrity of the contract, the integrity of the negotiation process, and to ensure some uniform application, or at the least agreed upon application, of wage increases for **all** the bargaining unit members, not just those at the WWTP operation.

In terms of the third prong of the test, bad faith, again much of Mr. Lauman's complaint centers around his perception there was a lack of communication, somehow tied to the earlier decertification. To a degree this is a two way street and if an employee does not ask for information it is hard for a union to know what to provide, or how much to provide at any given time in the negotiation process. There may also be some difficulty in that the WWTP operation is away from the central administrative offices of the City of Kalispell. That said, there is no excuse for not keeping people informed, but lack of information has not been the standard used to determine whether a union has acted in bad faith towards its members. The good-faith conduct of a union is protected unless the conduct is sufficiently outside a "wide range of reasonableness" so as to be considered irrational. To establish a lack of good faith there must be evidence of fraud, deceitful action, or dishonest conduct by the union, Schmidt v. Electrical Workers (IBEW) Local 949, 980 F.2d 1167, 141 LRRM 3004 (8th Cir. 1992) and Aguinaga v. Food & Commercial Workers, 993 F.2d 1167, 143 LRRM 2400 (10th Cir 1993) Cert. Denied 510 U.S. 1072, 145 LRRM 2320 (1994). And, as the Ninth Circuit held, there is a mandated deferential standard of review in evaluating union actions and they can be challenged successfully only if wholly irrational and even "unwise" or "unconsidered" union decisions will not rise to the level of irrational conduct, Stevens v. Moore Bus. Forms, 18 F3d. 1443, 145 LRRM 2668 (9th Cir. 1994). Here there is no evidence of bad faith on the part of the union.

Court and Board precedent aside, when asked for examples of how the union had acted in bad faith or in some way discriminated against him Mr. Lauman cited an example where fellow union workers, when passing his city owned vehicle, used to wave as they went by. Now, according to Mr. Lauman, newly hired employees will wave, but older members disregard him. In terms of other incidents none were really cited other than a general feeling of distance demonstrated by other employees. Even in the vein of communication, Mr. Lauman indicated an understanding of when and where union meetings were conducted, including an awareness of a union meeting on December 21, 2006. He further acknowledged that the previous president of the local did stop by the plant on an occasional basis. According to him the new president does not, but even Mr. Lauman acknowledged that the newness to the job, coupled with his other responsibilities may be a factor in the absence of the current president from the waste water treatment plant. In short, given the extensive body of law as to what constitutes a breach of the duty of fair representation, and then going beyond that to determine if there is some form of substantial evidence demonstrating discrimination or animus, there simply is none to warrant a finding of probable merit to the complaint.

III. Recommended Order

It is hereby recommended that Unfair Labor Practice Charge 12-2007 be dismissed.

DATED this 28th day of December 2006.

BOARD OF PERSONNEL APPEALS

By: /S/ John Andrew
John Andrew
Investigator

NOTICE

Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss may be appealed to the Board. The appeal must be in writing and must be made within 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the Board at P.O. Box 6518, Helena, MT 59604-6518. If an appeal is not filed the decision to dismiss becomes a final order of the Board.

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CERTIFICATE OF MAILING

I, /S/ Renee Crawford , do hereby certify that a true and correct copy of this document was mailed to the following on the 28th day of December 2006, postage paid and addressed as follows:

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